

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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MAR 16 2005

In the Matter of)

Amendment of Section 73.202(b),)

Table of Allotments,)

FM Broadcast Stations.)

(Gunnison, Crawford, and Olathe, Breckenridge,)

Eagle, Fort Morgan, Greenwood Village,)

Loveland, and Strasburg, Colorado, and Laramie,)

Wyoming))

MB Docket No. 03-144

RM-10733

RM-10788

RM-10789

**MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)**

Adopted: March 14, 2005

Released: March 16, 2005

By the Chief, Audio Division, Media Bureau:

1. The Audio Division has before it a Petition for Reconsideration filed by Dana J. Puopolo ("Petitioner") directed to the *Report and Order* in this proceeding.¹ KAGM, LLC, licensee of Station KAGM(FM), Channel 272A, Strasburg, Colorado, On-Air Family, LLC, licensee of Station KBRU-FM, Channel 268C, Fort Morgan, Colorado, Regent Broadcasting of Ft. Collins, Inc., licensee of Station KTRR(FM), Channel 273C2, Loveland, Colorado, NRC Broadcasting, Inc., licensee of Station KSMT(FM), Channel 272A, Breckenridge, Colorado and Station KTUN(FM), Channel 269C1, Eagle, Colorado, and AGM-Nevada, LLC, licensee of Station KARS-FM, Channel 275C1, Laramie, Wyoming (collectively "Joint Reconsideration Petitioners") also filed a Petition for Reconsideration.² Mayflower-Crawford Broadcasters ("MCB") filed a Request for Approval of Withdrawal ("Request").

2. **Background.** The *Notice* proposed the allotment of Channel 299C3 at Gunnison, Colorado, as that community's fourth local service. In response to the *Notice*, MCB timely filed a counterproposal requesting the allotment of Channel 272C2 to Crawford, Colorado, as its first local service. To accommodate the allotment at Crawford, MCB also requested the substitution of Channel 299A for Channel 272A at Gunnison, Colorado, the conforming modification of the Station KVLE-FM license; and a change in reference coordinates for vacant Channel 270C2 at Olathe, Colorado.

3. In a related submission, predecessors in interest of KAGM, LLC, the current licensee of Station KAGM(FM) and On-Air Family, LLC, licensee of Station KBRU-FM, Channel 268C, Fort Morgan, Colorado (collectively "Joint Rulemaking Petitioners") filed a petition for rulemaking prior to the August 22, 2003 comment date in this proceeding. The petition proposed the reallocation of Channel 272A from Strasburg to Greenwood Village, Colorado, as its first local service, and modification of the license of Station KAGM(FM) to reflect this change. To prevent removal of Strasburg's sole local existing service, the Joint Rulemaking Petitioners requested the substitution of Channel 268C for Channel 269A at Fort Morgan, Colorado, reallocation of Channel 268C from Fort Morgan to Strasburg, Colorado, and

¹ *Gunnison, Crawford, and Olathe, Breckenridge, Eagle, Fort Morgan, Greenwood Village, Loveland, and Strasburg, Colorado, and Laramie, Wyoming*, 19 FCC Rcd 18542 (MB 2004).

² The Joint Reconsideration Petitioners originally filed an Application for Review, but later requested that its appeal be treated as a Petition for Reconsideration.

modification of the license for Station KBRU-FM; and the relocation of the transmitter sites for Station KSMT(FM), Channel 272A, Breckenridge, Colorado and Station KTRR(FM), Channel 273C2, Loveland, Colorado.³ To facilitate Station KSMT(FM)'s relocation, the Joint Rulemaking Petitioners proposed the substitution of Channel 269C1 for Channel 268C at Eagle, Colorado, and modification of the license of Station KTUN(FM) accordingly.⁴ Moreover, the relocation of Station KTRR(FM) required the substitution of Channel 275C1 for Channel 275C at Laramie, Wyoming, and the conforming modification of the license of Station KARS-FM.⁵ The relocation of the transmitter site for Station KSMT-FM conflicted with the proposed allotment of Channel 272C2 at Crawford. Therefore, the petition was considered as a counterproposal because of its mutual exclusivity.

4. The *Report and Order* allotted Channel 272C2 at Crawford, as its first local service, priority (3), because it was preferred over a fourth local service at Gunnison, priority (4), based on the FM allotment priorities.⁶ To accommodate the Crawford allotment, the *Report and Order* also substituted Channel 299A for Channel 272A at Gunnison and modified the Station KVLE-FM license accordingly; and changed the reference coordinates for vacant Channel 270C2 at Olathe, Colorado. In addition, The *Report and Order* found that the several reference point relocation proffers were without effect and dismissed the Joint Rulemaking Petitioners' proposal for failure to comply with the minimum spacing requirements of Section 73.207.

5. **Petitions for Reconsideration.** The Petitioner requests reconsideration of the *Report and Order* because MCB filed a Request withdrawing its interest in the Channel 272C2 allotment at Crawford after issuance of the *Report and Order*.⁷ Instead, MCB requests the allotment of Channel 274C3 in lieu of Channel 272C2 at Crawford. The Petitioner notes that the proposed Channel 274C3 at Crawford would eliminate the existing conflicts with the proposed allotment of Channel 299C3 at Gunnison and the Joint Rulemaking Petitioners' proposal. The Petitioner further requests that the staff reconsider its new policy relating to the acceptance of transmitter site relocations for authorized stations in FM allotment proceedings.

6. The Joint Reconsideration Petitioners filed their Petition for Reconsideration contesting against the new policy cited in the *Report and Order*. The Joint Reconsideration Petitioners state that the decision made in the *Report and Order* was in error. The Joint Reconsideration Petitioners argue that nothing contained in Section 73.208(a)(1) forecloses the use of a theoretical site coupled with a commitment by the licensee to apply for a site that complies with the minimum spacing rules of Section 73.207. The Joint Reconsideration Petitioners also argue that Section 73.208(a)(2) does apply to authorized stations. Moreover, the Joint Reconsideration Petitioners assert that the staff misinterpreted Section 73.208(a)(1)

³ In this regard, Rocky Mountain Broadcasting I, LLC, former licensee of Station KSMT(FM) and Regent Broadcasting of Ft. Collins, Inc., licensee of Station KTRR(FM), consented to the relocation of their respective transmitter sites.

⁴ Salisbury Broadcasting Colorado, LLP, former licensee of Station KTUN(FM) consented to these proposed changes. As such, Station KTUN-FM was granted a construction permit to specify operation on Channel 269C1 instead of Channel 268C at Eagle, Colorado. See BPH-20020813ABK. The FM Table of Allotments reflects this change. See *Various Locations*, 18 FCC Rcd 19203 (MB 2003).

⁵ AGM-Nevada, LLC, licensee of Station KARS-FM consented to these changes. In this regards, Station KARS-FM was granted a construction permit to specify operation on Channel 275C1 in lieu of Channel 275C at Laramie, Wyoming. See BMPH-20020926ABK.

⁶ See *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88, 91 (1988). The FM Allotment priorities are (1) First full-time aural service. (2) Second full-time aural service. (3) First local service. (4) Other public interest matters. [Co-equal weight is given to priorities (2) and (3)].

⁷ Pursuant to Section 1.420(j) of the Commission's rules, MCB filed a declaration stating that it or any of its members individually have receive or will receive any money or other consideration in exchange for withdrawing its interest in the Channel 272C2 allotment.

because it failed to effectuate the licensees' proffers to relocate their respective transmitter sites needed for the proposal to achieve compliance with Section 73.207 and acted arbitrarily in doing so. The Joint Reconsideration Petitioners also stated that the staff failed to set forth the public interest benefits resulting from the new policy.

7. **Discussion.** Section 1.429 of the Commission's rules sets forth the limited provisions under which the Commission will reconsider a rulemaking action. Reconsideration is warranted only if there is an error of fact or law, or presentation of new facts or changed circumstances that raise substantial or material questions of fact which otherwise warrant Commission review of its prior action.

8. The Petitioner filed its Petition for Reconsideration on the basis of changed circumstances, specifically MCB's withdrawal of its interest in the conflicting Channel 272C2 allotment at Crawford. In doing so, MCB proposed the allotment of Channel 274C3 at Crawford to resolve the existing conflicts with the Petitioner's proposal and Joint Rulemaking Petitioners' proposal. As such, we are allotting Channel 274C3 in lieu of Channel 272C2 at Crawford, as its first local service.⁸ As a result, the Station KVLE(FM) Channel 299A substitution at Gunnison and the site relocation for vacant Channel 270C2 at Olathe is no longer necessary. We are also allotting Channel 299C3 at Gunnison, Colorado, as that community's fourth local service because there is no longer an impediment to this original proposal.⁹

9. We also agree that Section 73.208(a)(2) permits authorized stations to specify new reference coordinates in a rulemaking proceeding to establish compliance with Section 73.207 and grant reconsideration on this basis. Accordingly, it was error to dismiss the Joint Rulemaking Petitioners' proposal based on alleged Section 73.207 short spacings. On reconsideration, we reallocate Channel 272A from Strasburg to Greenwood Village, Colorado, as its first local service, and modify the license of Station KAGM(FM).¹⁰ To ensure continued operational local service at Strasburg, we reallocate Channel 268C from Fort Morgan to Strasburg, Colorado, as its first local operational service, and modify the license of Station KBRU-FM to reflect this change.¹¹ Fort Morgan will continue to receive local service from full-time AM Station KFTM. To accommodate the Greenwood Village reallocation, we modify the transmitter sites for Stations KSMT(FM), Channel 272A, Breckenridge, Colorado¹² and Station KTRR(FM), Channel 237C3, Loveland, Colorado.¹³ To facilitate Station KSMT(FM) relocation, we modify the license site for Station

⁸ Channel 274C3 can be allotted to Crawford in compliance with the minimum distance separation requirements of the Commission's rules provided there is a site restriction of 19.5 kilometers (12.1 miles) northeast at coordinates 38-38-09 NL and 107-34-43 WL.

⁹ Channel 299C3 can be allotted to Gunnison, consistent with the minimum distance separation requirements of the Commission's rules provided there is a site restriction of 19.5 kilometers (12.1 miles) northeast at coordinates 38-40-48 NL and 106-46-48 WL. This site restriction will ensure full-spacing to the license site of Station KBKL on Channel 300C at Grand Junction, Colorado.

¹⁰ Channel 272A can be allotted to Greenwood Village consistent with the Commission's minimum distance separation requirements provided there is a site restriction of 12.5 kilometers (7.7 miles) east of the community. The reference coordinates for Channel 272A at Greenwood Village are 39-37-32 North Latitude and 104-47-47 West Longitude.

¹¹ Channel 268C can be allotted to Strasburg consistent with the Commission's minimum distance separation requirements provided there is a site restriction of 41.9 kilometers (26 miles) east of the community. The reference coordinates for Channel 268C at Strasburg are 39-51-39 North Latitude and 103-51-44 West Longitude.

¹² The transmitter site for Station KSMT(FM), Channel 272A, Breckenridge, Colorado can be modified consistent with the Commission's minimum distance separation requirements provided there is a site restriction of 8.4 kilometers (5.2 miles) southwest of the community. The modified license coordinates for Channel 272A at Breckenridge are 39-25-52 North Latitude and 106-06-17 West Longitude.

¹³ The transmitter site for Station KTRR(FM), Channel 273C2, Loveland, Colorado also can be modified consistent with the Commission's minimum distance separation requirements provided there is a site restriction of 26.1

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KTUN(FM), Eagle, Colorado because the requested Channel 269C1 substitution was granted by minor change application.¹⁴ Moreover, because the requested Channel 275C1 downgrade at Laramie was also granted by minor change application, we modify the licensed site for Station KARS-FM, Laramie, Wyoming to accommodate Station KTRR-FM relocation.¹⁵ As noted, the affected licensees consented to modification of their respective transmitter sites. KAGM, LLC pledges that it will reimburse the affected licensees of Stations KSMT-FM, KTRR-FM, KTUN, and KARS-FM for their respective reasonable costs in modifying their facilities as necessary to permit the reallocation of Channel 272A at Greenwood Village, Colorado and the reallocation of Channel 268C at Strasburg, Colorado.

10. We modify the Station KAGM license to specify Greenwood Village as the community of license pursuant to § 1.420(i) of the Commission's rules, which permits the modification of a station's license to specify a new community of license without affording other interested parties an opportunity to file competing expressions of interest in the proposed allotment.¹⁶ The proposed reallocation of Channel 272A at Greenwood Village is mutually exclusive with the licensed site of Station KAGM(FM), Channel 272A, Strasburg, Colorado. When considering a reallocation proposal, a comparison is made between the existing allotment and the proposed allotment using the FM allotment priorities set forth in *Revision of FM Assignment Policies and Procedures*.¹⁷ In this instance, the reallocation will provide Greenwood Village with a first local service and provide a net gain in service to 1,426,803 persons. Strasburg will continue to receive local operational service from Station KBRU-FM.

11. As noted by MCB, Greenwood Village is located within the Denver-Aurora Urbanized Area. In this regard, we are concerned with the potential migration of stations from lesser-served rural areas to well-served urban areas. For this reason, we will not blindly apply a first local service preference when a station seeks to reallocate its channel to a suburban community in or near an Urbanized Area. In making this determination, we apply existing precedent.¹⁸ In essence, we consider the extent the station will provide service to the entire Urbanized Area, the relative populations of the suburban and central city, and, most importantly, independence of the suburban community.

12. In this situation, Greenwood Village, with a population of 11,035 persons, is entitled to consideration as a first local service. This population total is substantial. Although it is only 2 percent of the population of Denver (554,636 persons), this percentage should not preclude consideration as a first local service. With respect to the coverage of the Denver-Aurora Urbanized Area, Station KAGM(FM), as

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kilometers (16.2 miles) northeast of the community. The modified license coordinates for Channel 273C2 at Loveland are 40-34-33 North Latitude and 104-52-22 West Longitude.

¹⁴ *Id.* note 5. The transmitter site for Station KTUN(FM), Channel 269C1, Eagle, Colorado can be modified consistent with the Commission's minimum distance separation requirements provided there is a site restriction of 12.8 kilometers (7.9 miles) northwest of the community. The modified license coordinates for Channel 269C1 at Eagle are 39-45-15 North Latitude and 106-54-13 West Longitude.

¹⁵ *Id.* note 6. The transmitter site for Station KARS-FM, Channel 275C1, Laramie, Wyoming also can be modified consistent with the Commission's minimum distance separation requirements provided there is a site restriction of 47 kilometers (29.2 miles) south of the community. The modified license coordinates for Channel 275C1 at Laramie are 40-53-55 North Latitude and 105-42-31 West Longitude.

¹⁶ See *Modification of FM and TV Authorizations to Specify a New Community of License*, 4 FCC Rcd 4870 (1989) ("Change of Community R&O"), *recon. granted in part*, 5 FCC Rcd 7394 (1990).

¹⁷ *Id.* note 7.

¹⁸ See *Huntington Broadcasting Co. v. FCC*, 192 F. 2d 33 (D.C. Cir. 1951); *RKO General*, 5 FCC Rcd 3222 (1990); *Faye and Richard Tuck*, 3 FCC Rcd 5374 (1998) ("Tuck").

a Class A facility, will cover only 32 percent of the Urbanized Area. In any event, the Commission has stated that these factors have less significance than evidence of independence.¹⁹

13. Consistent with the factors set forth in *Tuck*, we conclude that Greenwood Village is not dependent upon the Denver-Aurora Urbanized Area. Greenwood Village is an incorporated community with an elected mayor and city council with a 2003 fiscal budget of \$32.8 million and a capital improvement budget of \$7.9 million. Greenwood Village maintains its own police department, municipal court, and recreation department. Greenwood Village provides zoning and code enforcement as well as street maintenance, snow and ice removal and trash pickup. South Metro Fire Rescue is headquartered in Greenwood Village. In addition, Greenwood Village has its own chamber of commerce, commercial establishments, health facilities and churches. The Cherry Creeks School District provides public schools and is headquartered in Greenwood Village. Finally, Greenwood Village has its own post office, ZIP code and weekly newspaper, the *Greenwood Villager*.

14. We also take this opportunity to clarify Commission procedures and policies which apply when an authorized station requests a change in reference coordinates as part of a proposal to amend the FM Table of Allotments. Typically, one station ("Station A") agrees to modify its coordinates to permit a second station ("Station B") to modify its allotment to specify a new city of license. On the effective date of an FM allotment rulemaking order which includes this arrangement, Station A will be protected at its newly specified coordinates with maximum class facilities. It will be permitted to continue to operate with its previously licensed facilities with an "implied STA" but would be subject to established cut-off and application conflicts processing policies with regard to any facility application or rulemaking proposal filed on or after the effective date of the order.²⁰ Station B enjoys full Section 73.207 protection rights vis-à-vis Station A, based on Station A's new reference coordinates.

15. The two stations, however, may enter into an agreement under which Station B files its implementing application which protects Station A at Station A's former licensed coordinates and Station B requests processing under Section 73.215. Assuming that the Commission has not previously authorized Station A as a Section 73.215 facility, Station A may file a letter request to reestablish its former licensed site as its protected site with Section 73.207 protection rights toward Station B. The Station A filing may not precede the Station B filing, must clearly identify the Station B filing, and, must demonstrate compliance with Section 73.207 or Section 73.215 to all other protectable records.

16. The Commission will send a copy of this *Report and Order* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, see 5 U.S.C. 801(a)(1)(A).

17. Accordingly, pursuant to the authority found in 47 U.S.C. Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) and 47 C.F.R. Sections 0.61, 0.204(b) and 0.283, IT IS ORDERED, That effective May 2, 2005, the FM Table of Allotments, 47 C.F.R. Section 73.202(b), IS AMENDED, with respect to the communities listed below, to read as follows:

Communities

Channel No.

Bridgeport, Nebraska

267C0

¹⁹ *Headland, Alabama, and Chattahoochee, Florida*, 10 FCC Rcd 10352 (1995).

²⁰ See 1998 Biennial Regulatory Review, *Streamlining of Mass Media Applications, Rules, and Processes*, 14 FCC Rcd 17525, 17540 n.55 (1999).

Crawford, Colorado	274C3
Fort Morgan, Colorado	-----
Greenwood Village, Colorado	272A
Gunnison, Colorado	252C3, 272A, 299C3
Laramie, Wyoming	236C, 244C2, 254A, 275C1, 283C2
Strasburg, Colorado	*249C3, 268C

18. IT IS FURTHER ORDERED, That pursuant to 47 U.S.C. Section 316(a) that the authorization of KAGM, LLC for FM Station KAGM, Channel 272A, Strasburg, Colorado, IS MODIFIED to specify operation on Channel 272A at Greenwood Village, Colorado, subject to the following conditions:

- (a) Within 90 days of the effective date of the *Order*, the licensee of Station KAGM shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;
- (b) Upon grant of the construction permit, program tests may be conducted in accordance with 47 C.F.R. Section 73.1620; and
- (c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to 47 C.F.R. Section 1.1307, unless the proposed facilities are categorically excluded from environmental processing.
- (d) Operation of FM Station KAGM on Channel 272A at Greenwood Village, Colorado, including program test operation pursuant to 47 C.F.R. Section 73.1620, will not be permitted until Station KBRU-FM activates service on Channel 268C at Strasburg, Colorado.

19. IT IS FURTHER ORDERED, That pursuant to 47 U.S.C. Section 316(a) that the authorization of On-Air Family, LLC for Station KBRU-FM, Channel 268C, Fort Morgan, Colorado, IS MODIFIED to specify operation on Channel 268C at Strasburg, Colorado, subject to the following conditions:

- (a) Within 90 days of the effective date of the *Order*, the licensee of Station KBRU-FM shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;
- (b) Upon grant of the construction permit, program tests may be conducted in accordance with 47 C.F.R. Section 73.1620; and
- (c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to 47 C.F.R. Section 1.1307, unless the proposed facilities are categorically excluded from

environmental processing.

20. IT IS FURTHER ORDERED, That pursuant to 47 U.S.C. Section 316(a) that the licenses of NRC Broadcasting, Inc. for Station KSMT(FM), Breckenridge, Colorado, IS MODIFIED to specify operation on Channel 272A at coordinates 39-25-52 NL and 106-06-17 WL; Regent Broadcasting of Ft. Collins, Inc. for Station KTRR(FM), Loveland, Colorado, IS MODIFIED to specify operation on Channel 273C2 at coordinates 40-34-33 NL and 104-52-22 WL; NRC Broadcasting, Inc for Station KTUN(FM), Eagle Colorado, IS MODIFIED to specify operation on Channel 269C1 at coordinates 39-45-15 NL and 106-54-13 WL; and AGM-Nevada, LLC for Station KARS-FM, Laramie Wyoming, IS MODIFIED to specify operation on Channel 275C1 at coordinates 40-53-55 NL and 105-42-31 WL subject to the following conditions:

- (a) Within 90 days of the effective date of the *Order*, the listed licensees shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;
- (b) Upon grant of the construction permit, program tests may be conducted in accordance with 47 C.F.R. Section 73.1620; and
- (c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to 47 C.F.R. Section 1.1307, unless the proposed facilities are categorically excluded from environmental processing.

21. Pursuant to 47 C.F.R. Sections 1.1104(1)(k) and (3)(l) of the Commission's rules, any party seeking a change in community of license of an FM or television allotment or an upgrade of an existing FM allotment, IF THE REQUEST IS GRANTED, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, KAGM, LLC, licensee of FM Station KAGM, Channel 272A, Strasburg, Colorado, is required to submit a rulemaking fee in addition to the fee required for the application to effectuate the community of license for FM Station KAGM to specify operation on Channel 272A at Greenwood Village, Colorado at the time its Form 301 application is submitted. On-Air Family, LLC, licensee of Station KBRU-FM, Channel 268C, Fort Morgan, Colorado is also required to submit a rulemaking fee in addition to the fee required for the application to effectuate the community of license for Station KBRU-FM to specify operation on Channel 268C at Strasburg, Colorado at the time its Form 301 application is submitted.

22. The window period for filing applications for Channel 299C3 at Gunnison, Colorado and Channel 274C3 at Crawford, Colorado will not be opened at this time. Instead, the issue of opening these allotments for auction will be addressed by the Commission in a subsequent order.

23. IS FURTHER ORDERED, That the aforementioned proceeding IS TERMINATED.

24. For further information concerning this proceeding, contact Rolanda F. Smith, Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

**Peter H. Doyle, Chief
Audio Division
Media Bureau**